No. 04-980

Supreme Court, U.S.
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In The
Supreme Court of the United States

JILL L. BROWN, Warden,

Petitioner,

v.

RONALD L. SANDERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is the California death penalty statute a "weighing statute," meaning the state court is required to determine that the presence of an invalid special circumstance, as part of one factor in the sentencing phase, was harmless beyond a reasonable doubt as to the jury's determination of the penalty?

2. If the first question is answered affirmatively, was it necessary for the state Supreme Court to specifically use the terms "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

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STATEMENT OF THE CASE

The Crime and The Trials. On Friday, January 23, 1981, Dale Boender and Janice Allen were attacked during a robbery at Boender's apartment in Bakersfield, California. Boender was wounded and Allen killed. At the time, Boender was a drug dealer. Allen, Boender's girlfriend, was an intravenous drug user. Boender supplied Allen with drugs, and at times Allen accompanied Boender on his drug sales. RT 163, 643, 650.

The State charged respondent Ronald Sanders and John Cebreros with murder and attempted murder. JA 50.[1] The State's case against Sanders rested largely on the testimony of Boender and Brenda Maxwell, who was Boender's biggest cocaine customer. RT 735. Their testimony failed to persuade the first jury to hear the case that either defendant was guilty. The jury could not agree on a verdict. JA 7.

The sources of doubt about Sanders' guilt are apparent from the record. Maxwell was an immunized accomplice, who originally was arrested for Allen's murder and who implicated Sanders under police pressure. RT 160-62, 198, 205. She was a heavy intravenous cocaine user who sold drugs for Boender, her only supplier, who had recently cut her off. RT 162-64, 733. Maxwell hid from the police and testified at the preliminary hearing only when a warrant for her arrest was issued. RT 160-61. She lied at the preliminary hearing, despite a grant of immunity. RT 204. At trial, Maxwell stated that "I told so many lies" and admitted that she would lie "[i]f I thought it would clear me." RT 200-01. After trial, the State conceded about

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[1] Petitioner, the former warden of the prison where respondent is confined, is referred to as "the State." Respondent is referred to by his surname. Citations to the record are as follow: "JA" refers to the Joint Appendix and "RT" refers to the trial court Reporter's Transcript.

Maxwell that "truthfulness was not her long suit," JA 159, and the state supreme court found that "Maxwell was admittedly not the most veracious witness." JA 78.

Nevertheless, Maxwell was a star witness for the State. Maxwell told the jury that she and her aunt, Donna Thompson, along with Sanders, planned to rob Boender on Wednesday, January 21, 1981, two days before the fatal attack on January 23. According to Maxwell, she was to lure Boender to her home with the false promise of a large drug sale and Sanders was to bind both Boender and Maxwell with duct tape, thus making Maxwell look innocent of the setup. JA 5, 50-51. The plan went awry. Allen showed up with Boender at Maxwell's home, and after a brief struggle between Boender and Sanders, Boender and Allen fled with the drugs. JA 5, 51. Maxwell testified that Sanders was worried that Boender could identify him. JA 6, 51. Sanders spoke with John Cebreros who agreed to help. JA 6, 51.[2]

On Friday, January 23, Boender and Allen were alone preparing dinner at Boender's apartment. There was a knock at the door, and Boender opened it. JA 6, 52. According to Boender, Sanders, holding a gun, and Cebreros stood outside. JA 6, 52. Boender saw the men for approximately five to seven seconds as they entered the apartment. JA 52; RT 780-81.

Boender testified that Sanders, the shorter of the two men, grabbed him, spun him around and pushed him to

[2] Maxwell also supplied police with a roll of duct tape that had Maxwell's and Sanders' fingerprints, among others, on it. JA 53; RT 383-90. Several witnesses presented an innocent explanation for Sanders' fingerprints on the duct tape. JA 54. On the afternoon of January 24, Sanders and some relatives moved a stove from Thompson's house when Thompson apparently was not home. RT 1435-61. Sanders used gray duct tape found at the house to shut the oven's broken door. RT 1438-39, 1454-55.

the floor, face down, JA 6, 52; RT 910, although Boender previously had told police that the larger man, Cebreros, did this. RT 911. When Allen emerged from the kitchen, she was made to lie on the floor next to Boender. JA 6, 52. Boender and Allen were bound and blindfolded. JA 6, 52.

Boender felt someone remove his money and his wallet. JA 52. He heard rummaging and banging inside the apartment, and he was dragged into another room by one person, who then left the room. JA 6, 52. Boender heard one man say he wanted to leave the apartment and the other say he wanted to stay. JA 6, 52. Boender did not know which of the two men said he wanted to go. JA 6; RT 791. Boender heard footsteps approach and felt a blow to his head. JA 6, 52. He recalled nothing further until Sunday, January 25. JA 6, 52; RT 692-93.

Early on Saturday, January 24, Boender's roommates discovered Boender lying in blood on his bed and Allen's body in another bedroom. JA 6-7, 52. Allen died from a blow to the head that fractured her skull and lacerated her brain. JA 7, 53. Boender also suffered a skull fracture. JA 7, 53.

At trial, Boender unequivocally identified Sanders as the man who tried to rob him on Wednesday, January 21, and identified both Sanders and Cebreros as his assailants on Friday, January 23. RT 656, 676, 957, 959.

Tried together, Sanders and Cebreros argued that Boender's identifications were mistaken for several reasons. Boender observed his assailants on both Wednesday and Friday for a short time under violent circumstances. RT 675-79, 779-81. On Friday, he had been smoking marijuana and drinking wine, RT 598-99, 871-72, and he had been given narcotic pain medication for the injuries he sustained on Wednesday. RT 749, 1418-22. Suffering amnesia from his head injuries, Boender had no memory at all of the two days before or the day after the murder, no recollection of the unrecorded police interview in which

he described his assailants, and only a hazy memory of the three weeks following the attack. RT 692-93, 764-74, 779-81, 919. Boender also gave contradictory statements about the identity of the Friday intruders. At trial, Boender insisted that Sanders and Cebreros were the assailants, RT 676-77, but at the crime scene, Boender told police and emergency personnel that he did not know, and had never before seen, his assailants. RT 1133, 1151-53.

Moreover, three witnesses testified that Sanders and Cebreros spent the night of the murder at the home of Cebreros' brother, talking, playing chess and drinking beer. JA 7, 53; RT 1240-46, 1253-58, 1264-71. The defense also emphasized that none of the physical evidence at the murder scene was connected to either Sanders or Cebreros, while some key evidence – a hair found tied within the cord knot binding Allen's wrists and a fingerprint on the handle of the vacuum cleaner from which the cord had been cut – remained unidentified. RT 365-66, 1191, 1198-1203, 1213-14.

Finally, the defense established that other people had a motive and might have robbed and attacked Boender and Allen. Donna Thompson, who frequently purchased drugs from Boender and was angry at him for having "shorted" her on a cocaine buy, apparently knew that Allen had been killed before the news was public, and told Maxwell that Allen "was not supposed to be dead" and "that wasn't what was planned." JA 23; RT 1005; RT 145. After being questioned by police, Thompson disappeared. RT 205, 998-99. In addition, Allen's grandmother agreed to testify for the defense. Allen told her grandmother a different version of the attempted robbery on Wednesday, January 21. Allen said three men had beaten her and Boender and had tried to steal her pocketbook in a parking lot because of a debt Boender owed. RT 1227-32. Finally, around the time of the Friday crimes, Boender's neighbors saw two men outside of Boender's apartment who looked

somewhat like, but were not, Sanders and Cebreros. JA 53; RT 1296-97, 1302, 1313-15, 1321-26, 1337-42.

The second jury convicted both Sanders and Cebreros of first degree murder. The jury also found both men eligible for the death penalty with true findings of the four special circumstances alleged under California Penal Code § 190.2 (hereafter "§ 190.2"): the burglary-murder special circumstance, § 190.2(a)(17)(vii), the robbery-murder special circumstance, § 190.2(a)(17)(i), the witness-murder special circumstance, § 190.2(a)(10), and the especially-heinous-atrocious-and-cruel-murder special circumstance, § 190.2(a)(14). JA 50. The prosecution pursued and obtained a death sentence against Sanders, but waived its request for a death sentence against Cebreros. JA 7-8, 54.

At the penalty phase, the State introduced evidence that Sanders had pled guilty to one count of robbery and had committed four other robberies in Orange County, California, 11 years earlier, and had served nearly three years in prison. JA 8, 54; RT 1855-83, 1894, 1900. At the start of the penalty phase, Sanders stated that he wanted no defense presented on his behalf, because he wanted neither a sentence of life imprisonment without the possibility of parole nor a death sentence. JA 8, 54, 105; RT 1837. Rather, insisting on his innocence, Sanders wanted to leave the courtroom and go home. RT 1837. Acquiescing in Sanders' request, his attorney presented no evidence or argument at the penalty phase. JA 8, 54, 105.

The jury was instructed in the statutory language of California Penal Code § 190.3 (hereafter "§ 190.3"). JA 148-50. The jury was told that it must weigh aggravating factors and mitigating factors. JA 150. The jury also was instructed as follows:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

JA 150. In his closing argument, the prosecutor urged the jury to return a death sentence, particularly emphasizing the "heinous, atrocious, and cruel" nature of the murder and the jury's "heinous, atrocious, and cruel" special circumstance finding. JA 143-44.

During its deliberations, the jury sent a note to the trial judge asking "what are the consequences if the jury is unable to arrive at a unanimous decision?" JA 151. The judge instructed the jury not to consider that possibility at all. JA 151. This second jury returned a death verdict, JA 152, which the trial judge confirmed and imposed. JA 153-55.

Direct Appeal and Habeas Corpus Proceedings. On September 27, 1990, on direct appeal, the California Supreme Court affirmed Sanders' convictions and death sentence. JA 112. The state court found that two of the four special circumstance findings were invalid – the burglary-murder special circumstance, JA 94, and the unconstitutionally vague heinous-atrocious-and-cruel-murder special circumstance. JA 98. Citing to *Zant v. Stephens*, 462 U.S. 862 (1983), and two prior state decisions, the state court concluded that the jury's consideration of the invalid burglary-murder and invalid heinous-murder special circumstances in imposing the death penalty on Sanders was "benign" and that "there was little chance defendant was prejudiced" by it. JA 99-100.

On December 20, 1993, Sanders filed an amended petition for a writ of habeas corpus in the United States District Court for the Eastern District of California.

On August 24, 2001, the district court denied Sanders' habeas petition. JA 8. On July 8, 2004, the Court of Appeals affirmed the denial of the petition as to Sanders' convictions but conditionally granted the petition as to the death sentence. JA 30. The circuit court first held that California is a weighing state for purposes of assessing the effect of an invalid aggravating factor on the imposition of a death sentence, JA 12-16, a proposition the State never disputed until seeking rehearing en banc. The circuit court next held that the California Supreme Court neither independently reweighed the aggravating and mitigating factors to determine the appropriate sentence nor conducted a constitutional harmless error analysis to determine that the error was harmless beyond a reasonable doubt. JA 16-19. Finally, the circuit court held that Sanders was entitled to relief because the error had a substantial and injurious effect or influence on the jury's death sentence, JA 19-25, a ruling that the State did not contest in its petition for writ of certiorari and does not genuinely dispute in its Brief on the Merits.

California's 1978 Capital-Sentencing Statute. In California, a defendant is eligible for the death penalty when the jury finds him guilty of first degree murder and finds true one of the special circumstances listed in § 190.2. *People v. Mickey*, 54 Cal.3d 612, 677, 818 P.2d 84, 117 (Cal. 1991). The trial of a death-eligible defendant then proceeds to a separate penalty phase pursuant to § 190.3, where the same jury chooses between death and life imprisonment without the possibility of parole.

Section 190.3 guides the jury throughout this sentence-selection process. It lists 11 sentencing factors which the jury "shall consider" – factors (a) through (k) – and instructs the jury to take them into account "if relevant."

Factor (a) contains two independent components: "the circumstances of the crime of which the defendant was convicted in the present proceeding" *and* "the existence of any special circumstances found to be true. . . ." § 190.3. Although § 190.3 on its face does not label the aggravating and the mitigating factors, the California Supreme Court has. At the time Sanders' death sentence was affirmed, the state court had made clear that only factor (a), factor (b), unadjudicated crimes involving the use or threat of force or violence, and factor (c), prior felony convictions, were aggravating. *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (Cal. 1989). Thus, the special circumstance findings, which made Sanders death-eligible under § 190.2, also were aggravating factors at the penalty phase under § 190.3.

The remaining factors (d) through (k) were mitigating. See *People v. Gallego*, 52 Cal.3d 115, 200, 802 P.2d 169, 214 (Cal. 1990); *People v. Whitt*, 51 Cal.3d 620, 654, 798 P.2d 849, 869 (Cal. 1990). Under California law, residual or lingering doubt is a mitigating circumstance admissible under factor (k) and other enumerated factors. *People v. Cox*, 53 Cal.3d 618, 676-77, 809 P.2d 351, 384 (Cal. 1991); *People v. Thompson*, 45 Cal.3d 86, 134, 753 P.2d 37, 67 (Cal. 1988).

Section 190.3 prescribes the method the jury is to follow when it considers these sentencing factors in deciding whether a death-eligible defendant will live or die. Section 190.3 explicitly requires that the jury be instructed to weigh the aggravating factors against the mitigating factors. JA 141. Section 190.3 expressly mandates that the jury impose death if aggravation outweighs mitigation:

> [T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.

JA 141. Conversely, § 190.3 directs the jury to impose life in the event that mitigation outweighs aggravation:

> If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

JA 141.

The state supreme court has imposed two strict limits on the presentation of aggravating factors under § 190.3. First, the prosecutor may only introduce evidence in aggravation that is relevant to a specific, listed statutory sentencing factor. *People v. Boyd*, 38 Cal.3d 762, 773-74, 700 P.2d 782, 790-91 (Cal. 1985). Second, the prosecutor may not argue that the absence of a mitigating factor is an aggravating factor. *People v. Davenport*, 41 Cal.3d 247, 289-90, 710 P.2d 861, 888 (Cal. 1985).

SUMMARY OF ARGUMENT

In 1976, the California Supreme Court held that California's then-current mandatory death penalty law violated the Eighth Amendment. *Rockwell v. Superior Court*, 18 Cal.3d 420, 556 P.2d 1101 (Cal. 1976). The state legislature responded in 1977, enacting a new capital punishment law. Under the 1977 statute, jurors deciding whether to sentence a defendant to death were permitted to consider not only the aggravating circumstances set forth in the statute, but any other matter the prosecution thought relevant to sentencing. The statute provided no guidance or limitation on the jury's sentencing discretion and said nothing about what role, if any, aggravating factors played in the decision to impose death. This statute properly has been held to be a nonweighing statute. *Williams v. Calderon*, 52 F.3d 1465, 1479 (9th Cir. 1995).

That is *not* the statute at issue in this case. Instead, this case involves the 1978 death penalty statute. Under the 1978 statute as applied in this case, jurors were limited to considering three aggravating factors specifically set forth in the statute; they were explicitly required to weigh the aggravating factors – which include the special circumstances – against the mitigating factors; and they could not impose death unless they found that the "aggravating circumstances outweigh[ed] the mitigating circumstances." JA 150. The Court has granted certiorari to determine if this statute creates a weighing scheme.

In deciding this question, it is significant that the state supreme court repeatedly has stated that the weighing of aggravating and mitigating circumstances is the core of the death penalty decision under the 1978 law. The state supreme court has noted that the very reason the 1977 statute was replaced was to ensure that the jury weighed specified aggravating factors against mitigation. And the state supreme court has analogized the 1978 statute to Florida's weighing statute. Indeed, in defending this statute before this Court, the State not only has conceded the centrality of weighing in the state statute, but it has gone further and explicitly admitted that California is a weighing state.

The State now takes a decidedly different tack. In effect, the State urges this Court to ignore the plain language of the 1978 law, the decisions of the state supreme court interpreting that law, and its own prior assurances as to how the statute works. The State urges the Court to take this extraordinary step because it now believes that two features of the 1978 statute are "unique" to California and preclude it from being considered a weighing state: (1) California's death-eligibility and penalty-selection criteria are not identical and (2) California allows the jury to consider the circumstances of the

crime in deciding whether a death-eligible defendant should live or die.

There is nothing unique about either of these features. The Court has held jurisdictions with these precise features to be weighing states. In fact, not only are there no decisions of this Court to support either of the State's arguments, but the suggestion that a jury in a weighing state may not consider the facts of a particular crime before deciding a capital defendant's fate is unfathomable.

In the final analysis, this Court decides if a jurisdiction is a weighing state by looking to see whether aggravating factors play a formal role in the decision to sentence a defendant to die. Where aggravating factors play no role in that decision, the jurisdiction is not a weighing state. Where aggravating factors play a specified role in that decision, as where the jury decides the penalty by formally weighing aggravating and mitigating factors, the jurisdiction is a weighing state. And where the jury considers invalid aggravating factors in a weighing state – where it puts invalid factors on death's side of the scale – Eighth Amendment error has occurred. *Sochor v. Florida*, 504 U.S. 527, 532 (1992).

That is exactly what happened here. The jury was told to decide if Sanders should die by weighing aggravating factors, which included the special circumstances found true at the guilt phase, against mitigating factors. The jury was told that it could not impose death unless it found that aggravation outweighed mitigation. The jury was told that it could not impose life unless mitigation outweighed aggravation. And in asking the jury to impose death, the prosecutor told the jury to weigh on death's side of the scale as aggravating factors two special circumstances which the state supreme court *itself* held invalid.

The State's argument in this case would require the Court to treat the 1978 law as if it were no different than

the 1977 law. The argument should be rejected; California is now a weighing state.

The Court of Appeals' decision to grant relief is without fault. The jury's consideration of two invalid aggravating factors was Eighth Amendment error. The circuit court properly applied the test for prejudice set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and found that this error had a substantial and injurious effect on the death verdict. The State did not even seek review of the lower court's *Brecht* analysis, arguing only that the state court's harmless error analysis bars relief in federal court.

The State is wrong. Under the Court's rules for cases *not* under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), such as this one, when a federal habeas court finds constitutional error in a state criminal trial, it must determine if the error had a substantial and injurious effect on the verdict. If so, relief is required. If not, relief must be denied. The State's focus on the intricacies of the state court's harmless error analysis is singularly inappropriate in this pre-AEDPA case.

But even if an inadequate state court harmless error analysis is a prerequisite to application of *Brecht* in a pre-AEDPA habeas case, relief was proper here. The state court here did not apply a constitutional harmless error standard, or anything close. Instead, it applied a state prejudice standard which not only permitted it to resolve the prejudice question without considering mitigation, but which affirmatively put the burden on Sanders to prove prejudice. The circuit court's decision to grant penalty phase relief should be affirmed.

ARGUMENT

I. CALIFORNIA IS A WEIGHING STATE BECAUSE IT REQUIRES THE JURY TO CHOOSE LIFE OR DEATH BY WEIGHING AGGRAVATING FACTORS, INCLUDING ANY SPECIAL CIRCUMSTANCES FOUND TRUE, AGAINST MITIGATING FACTORS AND PRECLUDES DEATH UNLESS AGGRAVATION OUTWEIGHS MITIGATION.

Until this case, no one has seriously questioned that California is a weighing state. Although this Court has not directly addressed the issue, the Court repeatedly has recognized that the California statute directs juries to weigh aggravating and mitigating circumstances in determining the penalty in a capital case. *Boyde v. California,* 494 U.S. 370, 377-78 (1990); *California v. Brown*, 479 U.S. 538, 540 (1987); *California v. Ramos,* 463 U.S. 992, 995 n.3 (1983). In addition, 14 years ago, two members of the Court pointed out that California is a weighing state. Dissenting from denial of certiorari in *Pensinger v. California*, 502 U.S. 930 (1991), Justice O'Connor, joined by Justice Kennedy, observed that California, like Mississippi, "requires its juries to weigh aggravating and mitigating circumstances" *id.* at 931, and concluded that the California Supreme Court's harmless error analysis after invalidating one of two special circumstances was incompatible with *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Id.* at 931-32.

Justices O'Connor and Kennedy were correct: California is a weighing state under this Court's death penalty jurisprudence. This conclusion results from a straightforward application of the clear distinction between weighing and nonweighing death penalty statutes that this Court anticipated over 20 years ago in *Zant v. Stephens*, 462 U.S. 862, established in *Clemons v. Mississippi,* 494 U.S. 738 (1990), reaffirmed in *Stringer v. Black*, 503 U.S. 222

(1992), and has applied repeatedly. The weighing nature of California's death penalty statute is seen on the face of the statute, in the state court's understanding of the statute, and in the penalty instructions and the prosecutor's argument to Sanders' jury. The purportedly "unique" features of the state law on which the State now focuses do not turn California into a nonweighing state. The circuit court's conclusion that California's 1978 death penalty law is a weighing statute is as unremarkable as it is correct.

A. The Constitutional Hallmark Of A Weighing Statute Is That The Aggravating Factors Are Assigned A Specific Role In The Process The Jury Must Follow When Deciding If A Defendant Should Live Or Die.

In *Zant v. Stephens*, 462 U.S. 862, this Court first addressed the question of whether a death sentence that rests in part on an invalid aggravating circumstance violates the Eighth Amendment. There, the defendant's death sentence was based partly on an aggravating circumstance of "substantial history of serious assaultive criminal convictions" which the Georgia Supreme Court had found unconstitutionally vague. *Id.* at 867. As Justice Stevens explained in his opinion for the Court, the answer depends on the function of an aggravating circumstance in the sentencing process. *Id.* at 864; *id.* at 896 (Rehnquist, J., concurring). In the Georgia statute at issue in *Zant*, an aggravating circumstance only defines death-eligibility. *Id.* at 872. Its sole function is to narrow the class of persons convicted of murder who may be subject to capital punishment. *Id.* at 874.

Beyond this important but discrete role, an aggravating circumstance in Georgia "does not play any role" in guiding the sentencer in the only other decision it makes – whether to impose the death penalty. 462 U.S. at 874; see also *id.* at 900 (Rehnquist, J., concurring). As this Court

explained, "In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstances, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74 (footnote omitted). There is no requirement that the jury balance the aggravating and the mitigating circumstances in selecting the punishment. *Id.* at 874; *id.* at 894 (Rehnquist, J. concurring). The Court held that under this scheme, consideration of an invalid aggravating circumstance does not automatically require reversal of the death penalty. *Id.* at 890. The Georgia-type law is known as a "nonweighing" statute. *Stringer,* 503 U.S. at 229, 231.

Zant recognized that the capital-sentencing statutes of some states differ significantly from Georgia's. Under those statutes, the aggravating circumstance finding not only determines death-eligibility but "the law requires the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed." 462 U.S. at 873 n.12. The Court withheld an opinion about the significance of an invalid aggravating circumstance "under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Id.* at 890.

In *Clemons v. Mississippi*, 494 U.S. 738, the Court answered the question left open in *Zant*. The defendant's death sentence was premised in part on Mississippi's "heinous, atrocious or cruel" aggravating circumstance, which the Mississippi Supreme Court acknowledged was unconstitutionally vague. *Id.* at 743. Under the Mississippi statute, aggravating factors have a specific role in the penalty-selection process: to impose death the jury is

explicitly required to weigh aggravating factors against mitigating factors. *Clemons*, 494 U.S. at 745 n.2. The Court was clear about what differentiated the Mississippi and Georgia capital-sentencing statutes:

> In Mississippi, unlike the Georgia scheme considered in *Zant*, the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances.

Id. at 745. States with such statutes are known as "weighing" states. *Id.* at 749.

In the 15 years since *Clemons*, this Court has reiterated this same straightforward approach to determining whether death penalty statutes create a weighing scheme. See *Parker v. Dugger*, 498 U.S. 308, 318 (1991); *Stringer v. Black*, 503 U.S. at 229; *Sochor v. Florida*, 504 U.S. at 532; *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992); *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *Lambrix v. Singletary*, 520 U.S. 518, 521 (1997). It has found that Arizona, Florida, Mississippi and the United States have weighing statutes and that Georgia and Virginia do not. See *Richmond*, 506 U.S. at 46 (Arizona); *Parker*, 498 U.S. at 318 (Florida); *Clemons*, 494 U.S. at 745 (Mississippi); *Zant*, 462 U.S. at 873-74 (Georgia); *Tuggle v. Netherland*, 516 U.S. 10, 11-12 & n.1 (1995) (Virginia); *Jones v. United States*, 527 U.S. 373, 377-78, 402 (1999) (United States).

The common strand in these cases is clear. In each of the weighing states, the aggravating circumstances are assigned a specific role in the selection decision: the sentencer must compare, consider, balance or weigh the aggravation in relation to the countervailing mitigation before it can condemn a defendant to die. Every member of the Court has endorsed this definition of a "weighing" state. See *Stringer*, 503 U.S. at 231-32 (Rehnquist, C.J., Kennedy, J., Stevens, J., O'Connor, J.); *Lambrix*, 520 U.S. at 521 (Rehnquist, C.J., Scalia, J., Kennedy, J., Souter, J., and Thomas, J.) and *id.* at 540 (Stevens, J., Ginsburg, J.

and Breyer, J., dissenting). In contrast, in each of the nonweighing states, the aggravating circumstances play no formal role in the selection decision, and the jury is not required to follow any particular process before it can impose a death sentence on a death-eligible defendant. *Zant*, 462 U.S. at 873-74; *Tuggle*, 516 U.S. at 11-12 & n.1.

The Court explained the reason for distinguishing between weighing and nonweighing states in *Stringer*. In a nonweighing state like Georgia, an invalid aggravating circumstance does not taint a death sentence because "aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case." *Stringer*, 503 U.S. at 229-30. The situation is vastly different in a weighing state, where the very function of the aggravating circumstances is to guide and constrain the sentencer's discretion. Under such a scheme, an invalid aggravating circumstance skews the sentencing process. *Id.* at 232. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Ibid.*; accord *Sochor*, 504 U.S. at 532.

Further, as *Stringer* noted, the use of an invalid aggravating factor in a weighing process is worse than the use of such a factor to determine death eligibility, for at the penalty selection stage, the invalid factor creates the risk of an arbitrary death judgment predicated on an "illusory circumstance." 503 U.S. at 235. Simply stated, labeling a factor as "aggravating" matters to the selection decision in a weighing state.

The Court made precisely this point in *Clemons*. As noted, the jury in *Clemons* sentenced the defendant to death by relying in part on an invalid heinous-atrocious-or-cruel aggravating circumstance. This Court correctly observed that even absent this aggravating factor, all the circumstances of the murder were properly before the

sentencing jury. 494 U.S. at 754 n.5. Thus, the only real harm to the defendant was the jury's weighing of the heinous-atrocious-or-cruel circumstance formally designated as aggravating by the Mississippi legislature.

This Court has been unambiguous: the weighing of an invalid aggravating factor in the sentencing calculus that leads to a death sentence violates the Eighth Amendment. *Sochor*, 504 U.S. at 532; see also *id.* at 539; *id.* at 542 (Rehnquist, C.J., with White, J. and Thomas, J. concurring in part and dissenting in part.) It undermines the individualized sentencing required in capital cases, *Stringer*, 503 U.S. at 232, and "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be. . . . " *Id.* at 235. This, in turn, "creates the possibility not only of randomness but also of bias in favor of the death penalty." *Id.* at 236.

B. California's 1978 Capital-Sentencing Law Under Which Sanders Was Condemned To Die Assigns A Specific Role To The Aggravating Factors In The Selection Decision And Thus Is A Weighing Statute.

California's 1978 death penalty statute fits squarely within the Court's repeated definition of a weighing scheme. The decisions of the California Supreme Court, which emphasize the importance of the weighing of aggravating and mitigating factors, show that California has a weighing statute. In this Court, the State previously depicted California as a weighing state. Moreover, the jury instructions explaining § 190.3 at Sanders' penalty phase, as well as the prosecutor's argument for a death sentence, indisputably prove that Sanders was condemned to death under a weighing statute. All establish that the 1978 law unequivocally assigns a specific role to the aggravating factors, including the special circumstances, in the selection decision, which is the defining feature of a weighing statute.

1. The California Supreme Court views the weighing of aggravating factors against mitigating factors as the core of the selection decision under the state's 1978 capital-sentencing statute.

The California Supreme Court, of course, is the final authority on the meaning of California law. See *Stringer*, 503 U.S. at 234. Although it never has directly declared whether the California death penalty law is a weighing or nonweighing statute, its decisions interpreting the 1978 capital-sentencing law unmistakably demonstrate that the state court views the weighing of aggravating and mitigating factors as the core of the capital penalty determination in California.

Under the 1978 statute, the jury is directed to "consider, take into account and be guided by" the statutorily-enumerated aggravating and mitigating factors and to "impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances." JA 141. According to the California Supreme Court, the very purpose of the 1978 death penalty initiative was to make a "crucial change in the method by which the jury determines whether to impose the death penalty. . . . " *Boyd*, 38 Cal.3d at 773, 700 P.2d at 790. The 1978 law deliberately abandoned the 1977 law's procedure, which told the jury to consider the aggravating and mitigating circumstances enumerated in the statute but "provided no further guidance or limitation on the jury's sentencing discretion," and in its place, adopted a "process of weighing the specific factors listed in the statute. . . . " *Ibid.*; accord *People v. Brown*, 40 Cal.3d 512, 544, 726 P.2d 516, 532-34 (Cal. 1985). In fact, the proponents of the 1978 initiative sought to "require that the penalty be determined by weighing the aggravating and mitigating factors" because they believed that a statute without this weighing requirement would be unconstitutional. *Boyd*, 38 Cal.3d at 773 n.5,

700 P.2d at 782 n.5. Although the decision in *Zant* proved their belief to be wrong, "[t]hat issue was an unsettled one in 1978, however, and the proponents' concern was justified." *Ibid.* Thus, the California Supreme Court found that the very point of the 1978 law was to enact a death penalty statute that was *not* like the Georgia statute held to be a nonweighing scheme in *Zant*.

Six months after *Boyd*, the California Supreme Court discussed the meaning of California's capital-sentencing statute in *People v. Brown*, 40 Cal.3d 512, 726 P.2d 516. The state court explained that although "weighing" is "a process which by nature is incapable of precise description," it requires the jury to weigh the sentencing factors to determine the appropriate penalty. 40 Cal.3d at 541, 726 P.2d at 532. Under *Brown*, the aggravating factors still play a specific, designated role in the jury's decision whether to impose the death penalty. And the jury's penalty choice still hinges on its weighing of the aggravating and mitigating factors. The state court applied the *Brown* construction in affirming Sanders' death sentence. JA 100.

Since *Boyd* and *Brown*, the California Supreme Court has reiterated that "the crux of the jury's decision is the weighing of aggravating and mitigating factors." *People v. Kaurish,* 52 Cal.3d 648, 706, 802 P.2d 278, 309 (Cal. 1990); see *People v. Bolin,* 18 Cal.4th 297, 343, 956 P.2d 374, 406 (Cal. 1998) (the standard instruction "'clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty'"); *People v. Arias,* 13 Cal.4th 92, 171, 913 P.2d 980, 1030 (Cal. 1996) (jury must weigh factors and "determine whether the balance of aggravation and mitigation makes death the appropriate penalty"); *People v. Duncan,* 53 Cal.3d 955, 978, 810 P.2d 131, 144 (Cal. 1991) (post-*Brown* instruction "clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating"); *People v. Hendricks,*

44 Cal.3d 635, 654, 749 P.2d 836, 846 (Cal. 1988) ("the jury's function under [the 1978] law [is] to weigh the applicable aggravating and mitigating factors and, *on that basis*, and that basis alone, to determine whether death is an appropriate penalty").

Moreover, both before and after deciding Sanders' case, the California Supreme Court acknowledged the distinct role of the special circumstances as aggravating factors at the penalty phase. In assessing whether an invalidated special circumstance requires reversal of the death sentence, the state court "'presume[s] that the jurors [followed their instructions and] considered the invalid special-circumstance findings *independent* of their underlying facts[.]'" *People v. Benson*, 52 Cal.3d 754, 793, 802 P.2d 330, 353 (Cal. 1990), quoting *People v. Hamilton*, 46 Cal.3d 123, 151, 756 P.2d 1348, 1364 (Cal. 1988) (emphasis added). Thus, as this Court did in *Clemons*, the state court also has recognized there is an aggravating value to statutorily-defined aggravating factors separate and apart from their underlying facts. See *Clemons*, 494 U.S. at 754 n.5. In other words, labels matter.

The state court's rulings in *Hamilton* and *Benson* speak directly to the very reason this Court distinguishes between weighing and nonweighing states. In a nonweighing state, the existence of an invalid aggravating factor does not necessarily skew the jury's decision as to punishment precisely because the jury is not required to assign the aggravating factor a specific role in the decision to impose death. This contrasts sharply with a weighing state, where the jury is specifically required to place the invalid aggravating circumstance on death's side of the scale. In such a jurisdiction, the jury's sentencing calculus is necessarily skewed by an invalid aggravating factor. *Stringer*, 503 U.S. at 229-30, 232.

Finally, in discussing § 190.3's instruction that the jury decide whether the aggravating circumstances outweigh the

mitigating circumstances, the California Supreme Court repeatedly has compared California's statute to Florida's "somewhat analogous 'weighing' statute." *Brown*, 40 Cal.3d at 542, 726 P.2d at 532; *People v. Brown*, 45 Cal.3d 1247, 1260 n.5, 756 P.2d 204, 212 n.5 (Cal. 1988) (noting that the Florida statute addressed in *Proffitt v. Florida*, 428 U.S. 242 (1976) "like California's, provided that the penalty should be determined by 'weighing' the aggravating and mitigating factors. . . ."). The California statute, like Florida's, allocates the aggravating factors a specific function in the sentencer's deliberations.[3]

In sum, the California Supreme Court, "which is the final authority on the meaning of [California] law, has at all times viewed the State's sentencing scheme as one in which [the weighing] of aggravating [and mitigating] factors [is] critical in the jury's determination whether to impose the death penalty." *Stringer*, 503 U.S. at 234-35. As this Court observed in *Stringer*, "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Ibid.*

Nevertheless, that is exactly the approach the State takes in this case. For two main reasons, the State argues

[3] Although aggravating factors play an important role at the sentence-selection process in a weighing state, there is no requirement, as the State suggests, that a particular aggravating factor play a "key," "special," or "major" role. See Petitioner's Brief on the Merits (hereafter "PB") 13-14, 15, 18, 27. The question is whether the statute mandates that the finding of an aggravating factor plays some role in the selection process. See *Zant*, 462 U.S. at 874. If the statute does, it is a weighing statute, and consideration of an invalid aggravating factor on death's side of the scale is constitutional error. The qualitative description of the role played by a particular aggravating factor becomes significant only in determining whether consideration of the invalid aggravator in imposing a death sentence was harmless. But that question presupposes that the penalty was imposed under a weighing statute.

that the state court has concluded that California is a nonweighing state.

First, the State asserts that in reviewing the effect of invalid special circumstances considered as aggravating factors, the state court "has always relied on the 'nonweighing' state rules set out by this Court in *Zant*, just as it did in this case." PB 25. This assertion is false. In fact, in affirming death sentences under the 1978 law after invalidating special circumstances, the state court has relied on *Zant* in only three cases other than this one in the 22 years since *Zant* was decided. See *People v. Pensinger*, 52 Cal.3d 1210, 1271, 805 P.2d 899, 933 (Cal. 1991); *People v. Silva*, 45 Cal.3d 604, 632, 754 P.2d 1070, 1085 (Cal. 1988); *People v. Wade*, 44 Cal.3d 975, 998, 750 P.2d 794, 808 (Cal. 1988). Notably, two of these cases – *Silva* and *Wade* – predate *Clemons*. In this situation, a citation to *Zant* cannot possibly represent a considered choice between the rules announced in *Zant* and *Clemons*. In other cases, the state court did not cite *Zant* or indicate reliance on the nonweighing state rule. See, *e.g.*, *People v. Howard*, 1 Cal.4th 1132, 1195-96, 824 P.2d 1315, 1353 (Cal. 1992); *People v. Beardslee*, 53 Cal.3d 68, 95-96, 806 P.2d 1311, 1339 (Cal. 1991); *People v. Bonin*, 47 Cal.3d 808, 854, 765 P.2d 460, 487 (Cal. 1989); *People v. Adcox*, 47 Cal.3d 207, 251-52, 763 P.2d 906, 930 (Cal. 1988); *People v. Kimble*, 44 Cal.3d 480, 504, 749 P.2d 803, 817-18 (Cal. 1988); *People v. Allen*, 42 Cal.3d 1222, 1281-83, 729 P.2d 115, 152-53 (Cal. 1986). Thus, Sanders' case and *Pensinger* are the only decisions involving invalidated special circumstances since *Clemons* in which the state court relied on *Zant*. And in *Pensinger*, two members of this Court criticized the state court's reliance on the rule normally applicable to nonweighing states. 502 U.S. at 930-32.

More importantly, in the post-*Clemons* era, the California Supreme Court has specifically relied on *Clemons* and its progeny. For example, in *People v. Holt*, 15 Cal.4th

619, 693, 937 P.2d 213, 261 (Cal. 1997), the state court rejected the defendant's claim that the reversal of a special circumstance or a felony conviction, which are aggravating factors at the penalty phase, automatically requires reversal of the death penalty. The state court's explanation was simple:

> Harmless error standards may be applied to penalty phase error. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Stringer v. Black* (1992) 503 U.S. 222, 230; *Clemons v. Mississippi* (1990) 494 U.S. 738.

Id. at 261 (parallel citations omitted). This citation to *Sochor, Stringer* and *Clemons* is incomprehensible if, as the State asserts, seven years earlier when it affirmed Sanders' death sentence, the state court already had concluded that California's 1978 law was a nonweighing statute.

The State's theory imbues the state court's citation to *Zant* in this case with far more significance than the single-sentence reference can bear. When the state court decided Sanders' direct appeal, it had not yet acknowledged that this Court had articulated different rules for assessing the effect of an invalid aggravating circumstance in weighing and nonweighing states. That occurred more than two years later in *People v. Bacigalupo*, 6 Cal.4th 457, 470-74, 862 P.2d 808, 815-18 (Cal. 1993). The state court's ambiguous citation to *Zant*, especially in light of *Holt*'s specific citation of the *Clemons* harmless error rule, is insufficient to serve as a "shorthand signal," *Sochor*, 504 U.S. at 540, for a holding that California is a nonweighing state – a proposition that the California Supreme Court, to this day, never has endorsed.

But perhaps the best answer to the State's current position is its prior position. Although now equating the state court's citation to *Zant* with a judicial finding that California is a nonweighing state, in the lower courts in

this case the State consistently took precisely the *opposite* view. For example, in the Court of Appeals, the State not only argued that the state court had actually followed *Clemons* in dealing with this error, but asserted that the state court's citation of *Zant* was insignificant:

> Far from ignoring *Clemons*, the California Supreme Court's opinion is in accord with *Clemons*, even though the court did not specifically cite that case in its analysis. . . . [¶] The California court's reliance on *Zant* was proper since it cited *Zant* only for the proposition that a conviction can be upheld even when there is an invalid factor in aggravation.

Sanders v. Woodford, Ninth Circuit No. 01-99017, Appellee's Brief at 44. The State took the same position in the District Court. See *Sanders v. Woodford*, United States District Court for the Eastern District of California, No. CV-F-92-5471 REC-P, Answer with Points and Authorities to Second Amended Petition for Writ of Habeas Corpus at 227. The State's attempt to argue the *Zant* citation in support of patently inconsistent positions fundamentally undercuts its most recent theory that the state court's reliance on *Zant* is tantamount to a holding that California is a nonweighing state.

Second, the State suggests that in *People v. Bacigalupo*, 6 Cal.4th 457, 862 P.2d 808, the California Supreme Court found that California is a nonweighing state because the court distinguished the 1978 California law from the Mississippi law addressed in *Stringer*. PB 25-26. The distinction, however, relates to a legal question not at issue here. *Bacigalupo* held that the sentencing factors enumerated in § 190.3 are not subject to the Eighth Amendment vagueness standard that *Stringer* applied to Mississippi's aggravating circumstances. *Bacigalupo*, 6 Cal.4th at 476, 862 P.2d at 819. That ruling is of no moment in this case, since there is no question that Sanders' jury weighed as aggravating factors the heinous-murder

special circumstance and the burglary-murder special circumstance that the state court later invalidated. On the other hand, *Bacigalupo* did not discuss the *Stringer* ruling that does pertain here, *i.e.*, the constitutional remedy that *Clemons* provides the state appellate court when the sentencer in a weighing state considers an invalid aggravating factor, like the special circumstances in this case, in imposing the death penalty. Although the California court acknowledged the rules of *Zant* and *Clemons* on the effect on an invalid aggravating circumstance in a nonweighing state like Georgia and a weighing state like Mississippi, it did not address how those rules apply to the California capital-sentencing statute. *Id.* at 472-74; 862 P.2d at 817-18. *Bacigalupo* does not answer the question now before this Court.

In the final analysis, there should be no dispute about whether the California Supreme Court views the weighing of aggravation and mitigation as the polestar of California's capital-sentencing procedure. Indeed, the very year that the state court affirmed Sanders' death sentence, the State, which now asserts California is a nonweighing state, underscored the centrality of California's weighing process. In *Boyde v. California*, 494 U.S. 370, the State successfully urged this Court to uphold its capital-case weighing instruction. In its brief, the State described the "weighing of aggravating and mitigating circumstances" as "the heart of the California procedure." Respondent's Brief on the Merits, No. 88-6613, at 40 n.12; see also *id.* at 72-75 (extolling the virtues of California's weighing requirement). The State analogized California's sentence-selection procedure to that of Florida, *id.* at 66-67, pointing out that Florida's law requires "a determination of whether aggravation outweighed mitigation, *the same as California's.*" *Id.* at 89 (emphasis added). Florida, of course, is a weighing state for *Clemons*' purposes. *Sochor*, 504 U.S. at 532; *Parker,* 498 U.S. at 318.

Two years later, the State unequivocally admitted in this Court that California is a weighing state. Opposing a petition for certiorari in another case challenging a death sentence based in part on invalidated special circumstances, the State agreed with the petitioner "that California is a weighing state. . . ." *Mickey v. California*, No. 91-1860, Response in Opposition to Petition for Writ of Certiorari at 11.

Given this view, it is not surprising that throughout the litigation of this case in state court, in the United States District Court, and before the panel of the United States Court of Appeals, the State never contested Sanders' assertion that California is a weighing state. See JA 156 (accepting that "the more stringent test of error" set forth in *Clemons* "may be required" and arguing for denial of the state habeas petition under its standards); *Sanders v. Woodford*, United States District Court No. CV F-92-5471 REC-P, Answer to Second Amended Petition for Writ of Habeas Corpus at 226-27; *Sanders v. Woodford*, Ninth Circuit No. 01-99017, Appellee's Brief at 42-49. The State's belated assertion on certiorari that California is *not* a weighing state, is at odds with this Court's definition of a weighing state, the language and meaning of § 190.3 as repeatedly articulated by the state supreme court, and its own prior positions. The State's current position must be rejected.[4]

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[4] In fact, the State did not argue that California is a nonweighing state until filing its petition for rehearing en banc in the Court of Appeals. Its litigation of the case on the premise that California is a weighing state constitutes sufficient grounds for dismissing certiorari as improvidently granted. For the State to ask this Court to reverse the Court of Appeals on a ground that the State did not assert until after that court had decided this case shows a disrespect for orderly procedure that the Court should not condone.

2. The jury instructions and the prosecutor's argument in this case leave no doubt that the jury was specifically told to weigh invalid aggravating factors in deciding if Sanders should die.

Even if this Court were to ignore the view of the California Supreme Court as to the meaning of its own law, the jury instructions in this case make clear that Sanders was sentenced under a weighing statute. The instructions commanded the jury, in deciding whether Sanders should live or die, to consider and weigh the aggravating and mitigating circumstances upon which it had been instructed. JA 150. Under the instructions, the jury could not return a penalty verdict without first determining the relative weight of the aggravating and mitigating factors. JA 150. The instructions specifically referred to the special circumstances, two of which the California Supreme Court later invalidated, as sentencing factors the jury must consider. They stated:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors if they are applicable:
>
> A, circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

JA 149.

The concluding instruction told the jury to weigh the aggravating and mitigating circumstances to decide Sanders' fate:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

JA 150. These instructions unquestionably described a weighing statute.

The prosecutor reinforced this view of California's capital-sentencing process. He reminded the jury to consider the special circumstances, in addition to the circumstances of the crime, Sanders' robberies 11 years before the capital crime, and his conviction for robbery, as aggravating factors. JA 143-45. The prosecutor clearly identified the aggravating factors and the mitigating factors in accordance with state law. JA 143-47. And he highlighted the heinous-atrocious-and-cruel special circumstance:

> The murder of Janice Allen as you know, was willful and premeditated. It was a cold, calculated, callous act. You have already concluded and correctly so that it fell within the special circumstance known as especially heinous, atrocious and cruel murder, that it exhibited exceptional depravity, that it was a consciousless [*sic*], pitiless act committed against a young, defenseless woman in the prime of her life.

JA 143-44. The prosecutor's argument also placed heavy emphasis on the weighing instruction. He told the jurors they were required to consider the aggravating and mitigating factors. JA 143. He also reminded the jurors in no uncertain terms that if they found that the aggravation outweighed the mitigation, they were required to impose a death sentence:

> If you conclude that the aggravating circumstances in this case outweigh the mitigating circumstances, you shall impose the death penalty. In other words, you have got to look at the circumstances, the factors that the judge reads to

> you, make a determination if the aggravating circumstances outweigh the mitigating circumstances.
>
> If you conclude that they do, then it is your duty as jurors to return the death penalty in this case.

JA 143. And at the very end of his argument, the prosecutor repeated that same instruction to the jury. JA 147.

In short, under the instructions in this case, the jury's penalty decision was to be controlled by the weighing of the aggravating and mitigating factors. Unlike Georgia, but like Arizona, Florida, Mississippi, and the United States, California in this case ascribed a defined role to its aggravating factors at the selection stage. Unlike Georgia, California in this case did not leave the selection decision to an unguided jury. Rather, like Arizona, Florida, Mississippi, and the United States, California in this case mandated that the jury weigh the statutorily-designated aggravating factors, which included the special circumstances, against the mitigating circumstances before it imposed a death sentence. This prerequisite established that, for purposes of Sanders' trial, California is a weighing state.

C. The Purportedly Unique Features Of California's 1978 Capital-Sentencing Law Do Not Make It A Nonweighing Statute.

Against the plain language of § 190.3, the State urges this Court to hold that the statute does not mean what it says. The State primarily asserts that two purportedly unique features of the 1978 death penalty law render it a nonweighing scheme: (1) the statute's failure to limit the aggravating factors at the selection stage to the death-eligibility criteria, PB 12-16, 21; and (2) the nonpropositional nature of one of the aggravating factors, the "circumstances of the crime" aggravator. PB 19, 21-23. These arguments mistakenly latch onto peripheral aspects of

§ 190.3 and ignore what makes § 190.3 a weighing statute – its requirement that the jury consider enumerated aggravating circumstances that are given a specific function in the designated process for deciding the defendant's fate.

First, the State argues that to be a weighing state, California's aggravating factors at the selection stage must precisely mimic the special circumstances at the death-eligibility stage. PB 12-16, 21. The State cites no authority of this Court to support its position, and, in fact, the State's theory is simply wrong.

Mississippi is a weighing jurisdiction. *Stringer*, 503 U.S. at 229. In Mississippi, death eligibility is decided at the guilt phase through the definition of capital murder. Miss. Code Ann. § 97-3-19(2); *Ladner v. State*, 584 So.2d 743, 763 (Miss. 1991); *Stringer*, 503 U.S. at 232-33. At the selection stage, Mississippi does *not* limit its aggravating circumstances to its death-eligibility criteria. Although many aggravating circumstances reiterate the categories of capital murder, the prosecutor has the opportunity to prove two additional statutory aggravating circumstances: that, as in *Clemons*, the capital offense was "heinous, atrocious or cruel," Miss. Code Ann. § 99-19-101(5)(h), and that "[t]he defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person." Miss. Code Ann. § 99-19-101(5)(b). Thus, there is no identity between eligibility and selection factors in Mississippi.[5]

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[5] The State mistakenly asserts that death-eligibility is determined at the penalty phase of a Mississippi capital trial. PB 13-14. As shown above, in Mississippi death-eligibility is decided at the guilt phase with the definition of capital murder. At the time of *Clemons* and *Stringer*, every form of capital murder had a correlate aggravating circumstance; thus, the defendant entered the penalty phase with at least one aggravating circumstance already found against him. *Brown v. State*,

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The United States also is a weighing jurisdiction. *Jones*, 527 U.S. at 377, 398, 402; *id.* at 420-21 (Ginsburg, J., with Stevens, J., and Breyer, J., dissenting). Under the Federal Death Penalty Act of 1994, the finding of a statutory aggravating factor set forth in 18 U.S.C. § 3592 is required to make a defendant death-eligible. *Jones*, 527 U.S. at 377. The jury is then directed to weigh *other* aggravating factors, including nonstatutory aggravating factors, in selecting the penalty. *Ibid.* The United States does not restrict selection factors to eligibility factors.

Indeed, the State itself seems to recognize the difficulty in its position. The State concedes that the equivalence it urges between death-eligibility criteria and aggravating factors is not essential to the definition of a weighing state, for it occurs only "[i]n *most* 'weighing' states." PB 16 (emphasis added). Sanders' point here is simple: California, Mississippi and the United States are weighing jurisdictions without this congruence.

Second, the State's alternative argument – relying on the nonpropositional nature of the circumstances-of-the-crime aggravator – fares no better. The State suggests that this factor grants the jury unfettered sentencing discretion that somehow overrides the specified role of the aggravating factors to make California a nonweighing state like Georgia. See PB 19, 21-23.[6]

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682 So.2d 340, 354-55 (Miss. 1996); *Hill v. State*, 432 So.2d 427, 458 (Miss. 1983) (Hawkins, J., concurring in part and dissenting in part). Since *Clemons* and *Stringer*, another form of capital murder, *i.e.*, murder perpetrated on educational property, has been added which has no analog among the aggravating circumstances. Miss. Code Ann. § 97-3-19(2)(g).

[6] However broadly the State would like to read California's circumstances-of-the-crime aggravator, it cannot be equated with the all-encompassing Georgia statute, which permits the introduction of the crime facts and broad-ranging nonstatutory aggravating evidence including the defendant's general moral character and his predisposition

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The Court rejected this exact argument in *Clemons*. Mississippi is a weighing state in which the sentencing jury considers all the crime facts. In Mississippi, the jury is instructed that in deciding between death and life imprisonment it is to "consider the detailed circumstances of the offense for which the defendant was convicted." *Doss v. State*, 709 So.2d 369, 395 (Miss. 1996). The Mississippi Supreme Court repeatedly has upheld this instruction, explaining that to preclude the jury from considering the crime circumstances "would defy logic and reason" as well as the express language of the Mississippi statute and this Court's decision in *Tuilaepa v. California*, 512 U.S. 967 (1994). *Doss*, 709 So.2d at 396; accord *Jordan v. State*, 786 So.2d 987, 1026 (Miss. 2001). Indeed, in *Clemons*, this Court specifically noted that "[a]ll of the circumstances surrounding the murder already had been aired during the guilt phase of the trial" and that "a jury clearly is entitled to consider such evidence in imposing sentence." 494 U.S. at 754 n.5.

There is nothing remarkable in California and Mississippi directing their capital-sentencing juries to the circumstances of the defendant's crime. After all, they are "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Tuilaepa*, 512 U.S. at 976, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). As the Court stated in upholding California's circumstances-of-the-crime factor in *Tuilaepa*, "[w]e would be hard pressed to invalidate a jury instruction that

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to commit crimes. See *Zant*, 462 U.S. at 886 & n.22. In addition, much of the State's argument about California's nonpropositional sentencing factors and the structure of § 190.3 relates not to the question of whether California is a weighing state but to the question of whether the consideration of the invalid heinous-murder and burglary-murder special circumstances was harmless. See, *e.g.*, PB 17-18. See *ante* page 22, footnote 3.

implements what we have said the law requires." 512 U.S. at 976.

In short, neither of the State's observations about the California statute serves to distinguish it from schemes the Court unequivocally has held to be weighing. Equally important, both of the State's observations miss the mark. At the selection stage, this Court has been concerned primarily with the procedure by which a jury decides to impose a death sentence rather than with the substantive factors the jury is to consider in reaching that verdict. *California v. Ramos*, 463 U.S. 992, 999 (1983). Thus, the Court generally defers to "the State's choice of substantive factors relevant to the penalty determination." *Id.* at 1001; see *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991). In determining whether California is a weighing state, the question is whether § 190.3 assigns a definite role to the aggravating factors in the sentence-selection process that the jury must follow to impose the death penalty. Because it does, California is a weighing state. The substance of the factors – or whether they duplicate the death-eligibility factors – has nothing to do with this inquiry. If any invalid aggravating factor is considered as part of the sentencing calculus, then the jury, as the State acknowledges, "has considered a specific factor about the case that should never have informed its decision about the penalty." PB 9. That is the error – the skewing toward death – that the Eighth Amendment prohibits. *Sochor,* 504 U.S. at 532; *Stringer,* 503 U.S. at 232.

Indeed, the State's argument that the circumstances-of-the-crime aggravating factor trumps everything else in § 190.3 is refuted by *Stringer.* The Court there found that the Fifth Circuit "made a serious mistake" in *Johnson v. Thigpen*, 806 F.2d 1243 (5th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987), which interpreted Mississippi's capital-sentencing procedure very much like the State here reads California's. *Stringer*, 503 U.S. at 237. The Fifth Circuit

had held that because Mississippi adequately narrowed death-eligibility at the guilt phase, there was no constitutional problem in permitting the jury at the penalty phase to consider the "broad" and "open-ended" heinous-atrocious-or-cruel aggravating circumstance. *Johnson*, 806 F.2d at 1245-49. What this Court said about the Fifth Circuit's view of Mississippi's law could apply as well to the State's position in this case: "The [State] ignore[s] the [California] Supreme Court's own characterization of its law and accord[s] no significance to the fact that in [California] aggravating factors are central in the weighing phase of a capital sentencing proceeding." *Stringer,* 503 U.S. at 237.[7]

Further, the State here oppugns its position in this Court in *Boyde v. California*, 494 U.S. 370. In *Boyde*, the State defended §190.3's mandatory weighing of aggravating and mitigating circumstances as the mechanism by which California constrains the jury's sentencing discretion in order to avoid arbitrary and capricious death sentencing. *Id.*, No. 88-6613, Respondent's Brief on the Merits at 81-85. Having successfully argued to this Court in *Boyde* that California's strict weighing formula prevented juries from wielding unbridled discretion, the State abruptly shifts gears and now insists that simply telling a capital-sentencing jury to consider the facts of the very

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[7] The State correctly notes that the weighing process in California is not mechanical. PB 23. To the extent that the State suggests this makes § 190.3 a nonweighing statute, it is mistaken. In other weighing jurisdictions, the weighing process also is not mechanical or arithmetical. See *Tokman v. State*, 435 So.2d 664, 669 (Miss. 1983) (in Mississippi, the death penalty is not "imposed numerically" by counting the aggravating and mitigating circumstances); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973) (in Florida, weighing is not a "mere counting process" but "a reasoned judgment as to what factual situations require the imposition of death"); see also *Jones*, 527 U.S. at 399 (in a case under the federal statute the jury was told that weighing is not a counting process).

murder for which it is punishing the defendant converts § 190.3's carefully guided process of weighing aggravation and mitigation into a wholly unguided, discretionary, nonweighing sentencing scheme.[8]

[8] The State also cites as distinguishing the California statute: (1) the statute's failure on its face to identify the aggravating and mitigating factors; (2) the statute's failure to require that the jury make findings as to those factors; and (3) the fact that the invalid special circumstances do not affect the evidence before the sentencing jury. The first two "distinctions" are irrelevant to the determination of whether a state is a weighing state. First, although §190.3 does not identify the aggravating and mitigating factors, the California Supreme Court has. See *ante* at page 8. The state court also has held that an instruction differentiating the sentencing factors is unnecessary, since jurors can "readily" identify which are aggravating and which are mitigating. *Benson*, 52 Cal.3d at 802, 802 P.2d at 359.

Second, the absence of written or oral jury findings beyond the verdict deciding the sentence also is irrelevant to the definition of a weighing state. There is no question that in California at least one aggravating factor is proved at the penalty phase, because the true findings of the special circumstances at the guilt phase must be in writing and necessarily become sentencing aggravators. Cal.Pen. Code § 190.4, subd. (a). Explicit jury findings may facilitate appellate review, but they are not necessary. See *Clemons*, 494 U.S. at 750 (appellate courts can reweigh aggravating and mitigating circumstances notwithstanding a lack of written jury findings regarding mitigation). Nor are they essential in a weighing state. Florida is a weighing state in which judge findings but not jury findings are required. See *Espinosa*, 505 U.S. at 1081-82 (holding that the jury's weighing of an invalid aggravating factor constituted Eighth Amendment error). So is California. See Cal.Pen. Code § 190.4, subd. (e) (judge shall state reasons for findings on the record).

The State's third "distinction" is no distinction at all, but a veiled request that the Court overrule *Clemons*. As this Court made clear in *Clemons*, instructing the jury to weigh an invalid factor is constitutional error even if the factor does not alter the evidentiary mix. *Clemons*, 494 U.S. at 754 n.5. Justices O'Connor and Kennedy observed that the California Supreme Court's decision to uphold another death sentence because the invalid special circumstances did not alter the penalty phase evidence was "irreconcilable with *Clemons*. . . . The California Supreme Court's conclusion, moreover, makes little sense:

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In short, none of the purportedly unique aspects of § 190.3 transforms California's 1978 death penalty law from a weighing to a nonweighing statute. The circuit court's decision that California is a weighing state should be affirmed.

II. THE COURT OF APPEALS CORRECTLY ORDERED A NEW PENALTY TRIAL BECAUSE THE JURY'S WEIGHING THE INVALID SPECIAL CIRCUMSTANCES AS AGGRAVATING FACTORS ON DEATH'S SIDE OF THE SCALE WAS PREJUDICIAL.

Having determined that California is a weighing state, the Court of Appeals correctly found the jury's consideration of two invalid aggravating factors was Eighth Amendment error. JA 11. Following circuit precedent, the Court of Appeals conducted a two-step analysis. First, the court analyzed the state court's affirmance of Sanders' death sentence despite invalidating two special circumstances and concluded that the state court erroneously failed to apply the federal constitutional harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967). JA 16-19. Second, the court assessed prejudice under the standard this Court articulated in *Brecht v. Abrahamson*, 507 U.S. 619, JA 19-25, and granted relief.

The State did not seek review of this second holding, the *Brecht* conclusion. *Brown v. Sanders*, No. 04-980, Petition for Writ of Certiorari at 4-14. And the State does not really dispute the circuit court's *Brecht* analysis. PB 28-32. Instead, in this pre-AEDPA case, the State challenges

All jury instruction errors would be harmless under this reasoning, because none of them add to or subtract from the evidence considered by the jury." *Pensinger*, 502 U.S. at 931 (dissenting from denial of certiorari).

only the circuit court's first ruling. It asserts that because the state supreme court "review[ed] this case according to the proper harmless-error standard," the federal court should not have granted relief. PB 30.

The State's position should be rejected. The circuit court's *Brecht* ruling is correct and unchallenged. Moreover, the circuit court's review of the state court's harmless error analysis, made in an excess of caution, was unnecessary but also is correct.

A. The Court Of Appeals Correctly Applied *Brecht* And Determined That The Jury's Consideration Of Two Invalid Special Circumstances In Imposing The Death Sentence Requires A New Penalty Trial.

When a federal court finds constitutional trial court error in a pre-AEDPA habeas case, the question of whether relief should be granted is relatively straightforward. Under *Brecht*, a federal habeas court must grant relief if the error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638. The Court consistently has applied this standard. See, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 795 (2001); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998); *California v. Roy*, 519 U.S. 2, 4-5 (1996); *O'Neal v. McAninch*, 513 U.S. 432, 437-39 (1995).

None of these cases held, or even suggested, that before a federal court could apply *Brecht*, it had to analyze the state court's harmless error analysis. In fact, in *Brecht* this Court recognized that the state courts properly had applied the *Chapman* test to the constitutional error. 507 U.S. at 636. Nevertheless, the Court determined whether habeas relief was required by independently analyzing whether the error had a substantial and injurious effect or influence on the verdict. *Id.* at 638. Significantly, the Court did not, as a prerequisite to its harmless error analysis,

conduct a substantive review of the state court harmless error analysis. 507 U.S. at 636-39; accord *California v. Roy*, 519 U.S. at 4-6 (in order to grant relief for constitutional error which state courts found harmless, federal habeas court must apply *Brecht*).

This case, being a pre-AEDPA habeas petition, is governed by a direct inquiry into whether the error in the jury's weighing two invalid special circumstances requires relief under *Brecht*.[9] As to that inquiry, there is no dispute. The Court of Appeals found that reversal of the penalty verdict is required under *Brecht* for good reason. Indeed, although the State did not seek certiorari on this question, it is worth noting how careful that analysis was. The circuit court correctly concluded that weighing two invalid aggravating factors was prejudicial because this was a close case even in the absence of a formal mitigation defense. A unanimous verdict for death was not necessarily a foregone conclusion, as indicated by the first jury's inability to convict and the second jury's note asking about "the consequences if the jury is unable to reach a unanimous decision." JA 151.

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[9] The rule might be different, of course, under AEDPA. In cases governed by AEDPA, a federal court cannot grant relief on a federal claim unless the state court adjudication of that claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under this section, where a state court has found a constitutional error harmless, a federal habeas court may not grant habeas relief unless the state court's harmless error analysis is "contrary to or involved an unreasonable application of" the *Chapman* standard. See *Mitchell v. Esparza*, 540 U.S. 12, 15, 17-18 (2003). Under AEDPA, an analysis of the state court's harmless error analysis is required. *Ibid.* But the petition in this case was filed in 1993, nearly three years before AEDPA was signed into law. JA 8-9. Thus, as the State concedes, AEDPA "do[es] not apply to this case." PB 6 n.6; see also *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

The circuit court found that although the jury convicted Sanders of Allen's murder, the record left room for real uncertainty about the extent of his personal culpability and thus his deathworthiness. The State readily admitted both at trial and on appeal that the evidence does not show whether Sanders or Cebreros killed Allen, JA 158, 160, and the record is clear that one of the two men, and very possibly Sanders, wanted to leave the apartment after the robbery and before the blows were struck that wounded Boender and killed Allen. JA 6, 52. The issue of relative culpability is a "critical issue" in capital sentencing. *Green v. Georgia*, 442 U.S. 95, 97 (1979). As the circuit court found, "[t]here is good reason to believe that the jury may have had doubts about Sanders' role in the murder and that it may thus have been only marginally inclined to impose the death penalty." JA 23. Lingering doubt, which could be considered a mitigating factor under California law, *Cox*, 53 Cal.3d at 66-67, 809 P.2d at 384, is a powerful basis for a life sentence. Stephen P. Garvey, *Essay: Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998).

The circuit court further explained that the evidence also left room for substantial doubt about whether the killing was pre-planned or even intentional. JA 23-24. Although according to Maxwell, Sanders was worried that Boender could identify him after the failed robbery attempt, Thompson said that "Allen was not supposed to be dead" and her death "wasn't what was planned." JA 23; RT 1005. In addition, the manner of the killing – beating rather than shooting or stabbing – did not necessarily imply an intent to kill. JA 24. Unintentional homicides long have been considered less reprehensible, and thus deserving of less harsh punishment, than intentional

murders. See *Enmund v. Florida*, 458 U.S. 782, 800 (1982).[10]

The State's additional aggravating evidence was not overwhelming. As the circuit court explained, the robberies Sanders committed were aggravating, but they occurred 11 years before these crimes. JA 24.

Viewed in this context, the Court of Appeals rightly concluded that there was grave doubt about whether instructing the jury to weigh two invalid special circumstances had substantial and injurious effect or influence in determining the death verdict. JA 25. Weighed as an aggravating factor, the invalid heinous-murder special circumstance improperly informed the jury that it already had found that Allen's killing was the most egregious of murders. This is precisely what the prosecutor argued. Describing the murder as a "cold, calculated, callous act," the prosecutor focused on the jury's finding of the heinous-murder special circumstance. JA 143-44; see *ante* at page 29. He used the language of the special circumstance to remind the jurors that they already had found that the murder "exhibited exceptional depravity, that it was a consciousless [*sic*], pitiless act committed against a young, defenseless woman in the prime of her life." JA 144. The

[10] Other facts provided a basis for lingering doubt about Sanders' role in the crimes and his intent. None of the physical evidence at the crime scene was connected to either Sanders or Cebreros. JA 7. Maxwell was a liar, as she herself admitted. See *ante* at page 2. There was reason to question the reliability of Boender's identification of Sanders and Cebreros. See *ante* at pages 3-4. Donna Thompson, who had motive to rob and attack Boender and Allen, disappeared after being questioned by police and remained missing during both trials. JA 5; RT 205, 998-99. Neighbors saw two men outside of Boender's apartment around the time of the crimes who were not Sanders and Cebreros. JA 53. Moreover, Sanders presented witnesses who accounted for his whereabouts the entire evening that Allen was killed and offered an innocent explanation for his fingerprints on the duct tape that Maxwell claimed was to have been used in the Wednesday attempted robbery. JA 7, 53-54.

circuit court properly perceived that the jury likely relied on the invalid heinous-murder special circumstance. JA 21. Similarly, the circuit court accurately determined that the invalid burglary-murder special circumstance could not be considered harmless. JA 21. It erroneously permitted the jury to consider Allen's murder as among those the people of California had deemed worthy of capital punishment even if Sanders entered Boender's apartment only with the intent to commit an assault and had been the person who wanted to leave before the murder began. JA 21-22. Thus, the circuit court correctly understood that the jury likely considered the legally invalid "heinous, atrocious, and cruel" and "burglary" labels of the special circumstances as "decisive determinants" in sentencing Sanders to death. JA 23.

The Court of Appeals' careful *Brecht* analysis established that penalty relief is required in this case. This was the only prejudice analysis the circuit court had to conduct. Nevertheless, before undertaking its *Brecht* analysis and following recent circuit precedent, the circuit court concluded that the state court's harmless error analysis was inadequate under *Clemons* and *Sochor*. JA 11-12 citing *Morales v. Woodford*, 336 F.3d 1136 (9th Cir. 2003); JA 16-19. This preliminary analysis was unnecessary.

As five circuit courts have recognized, nothing in *Clemons* precludes federal habeas courts from performing their traditional inquiry into harmless error. Nor does *Clemons* suggest that a federal review of the state process is some kind of prerequisite to harmless error analysis. See *Williams v. Clarke*, 40 F.3d 1529, 1539-40 (8th Cir. 1994); *Coe v. Bell*, 161 F.3d 320, 334-37 (6th Cir. 1998); *Billiot v. Puckett*, 135 F.3d 311, 317-18 (5th Cir. 1998); *Davis v. Executive Director of Dept. of Corrections*, 100 F.3d 750, 768 n.18 (10th Cir. 1996); *Smith v. Dixon*, 14 F.3d 956, 975-77 (4th Cir. 1994). Plainly put, *Clemons* does not support the proposition, implicit in the ruling below, that a

state court's harmless error analysis can bar federal habeas courts from assessing the prejudicial impact of a constitutional error. Were it otherwise, the Court could not have undertaken its *Brecht* harmless error analysis in a number of cases. See, *e.g.*, *Coleman*, 525 U.S. at 143, 146; *Roy*, 519 U.S. at 3-4; *Brecht*, 507 U.S. at 626, 638.

Clemons, a direct review case, held that when a sentencer in a weighing state considers an invalid aggravating factor, a new penalty phase is not required in two situations. First, on direct appeal, a state reviewing court can reweigh the valid aggravating factors against the mitigating factors and itself decide if death is appropriate. 494 U.S. at 748-50. Second, on direct appeal, a state reviewing court can apply constitutional harmless error analysis and find that the sentencer's consideration of the invalid aggravating factor is harmless beyond a reasonable doubt. *Id.* at 752-53. To resolve the case, the Court had to determine which of these options (if any) the Mississippi Supreme Court had taken, and this determination required the Court to focus on the state court analysis. *Id.* at 750-54.

As *Clemons* teaches, if the state reviewing court itself weighs aggravation and mitigation and imposes a death sentence, then the defendant's death sentence no longer is tainted by the presence of an invalid aggravator. See 494 U.S. at 748-50. In that situation, the constitutionally invalid sentence imposed by the jury is cured by the constitutionally valid sentence imposed by the appellate court. See *Wainwright v. Goode*, 464 U.S. 78, 86-87 (1983) (Florida Supreme Court's independent reweighing without the improper aggravating circumstance remedied the trial court's tainted death sentence); *Coe*, 161 F.3d at 334 ("In reweighing, a state court effectively vacates the original sentence and resentences the defendant."). Thus, to determine if the defendant's sentence was still tainted, the

Court had to examine how the state supreme court had treated the error. *Clemons*, 494 U.S. at 751.

In this case, however, the California Supreme Court did not conduct appellate reweighing, as both the circuit court and the State note. JA 17; PB 28 n.14. Instead, the state court conducted some type of harmless error analysis. JA 17. In this situation, the error is not cured in the same sense as with the imposition of an untainted sentence through appellate reweighing. See *Smith*, 14 F.3d at 977 ("Harmless error analysis does not involve conducting a new sentencing calculus."). Rather, the error still exists but has been found not to have prejudiced the death sentence. There is no need to scrutinize the state reviewing court's analysis. The mere fact that the state court has performed a harmless error analysis does not immunize the error from harmless error review in federal court. Cf. *Brecht*, 507 U.S. at 626-29 (applying harmless error test even though state courts applied harmless error test); *Roy*, 519 U.S. at 5-6 (same).

In the final analysis, because California is a weighing state, there was constitutional error when the jury considered two invalid special circumstances as aggravating factors in sentencing Sanders to die. This error was not cured by appellate reweighing of the aggravation and mitigation. As with any other constitutional error in a pre-AEDPA habeas case, the proper approach is simply to apply *Brecht* and determine if relief is required. Because the State does not take issue with the circuit court's *Brecht* analysis, and because that analysis carefully considered the impact of the error on Sanders' death sentence, there is no reason to disturb the circuit court's conclusion.[11]

[11] In a footnote, the State suggests that the proper remedy in this case "is not to reverse this penalty but to remand the case for proper state court review." PB 32 n.16. As an initial matter, this argument is waived. The State never made this argument below nor has it ever

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B. The Court Of Appeals Unnecessarily But Correctly Determined That The State Court's Harmless Error Review Was Constitutionally Flawed.

Although the Court of Appeals did not need to review the state court harmless error analysis before applying *Brecht* in this pre-AEDPA habeas case, the conclusion reached in that review – that the state court "did not find, as it was required to do, that the error was 'harmless beyond a reasonable doubt,'" JA 17 – is entirely correct.

On direct appeal in state and federal courts, federal constitutional errors require reversal unless the beneficiary of the error proves it harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Under this standard for assessing constitutional errors, the burden of proving the error harmless is explicitly placed on the state. *Ibid.*

In this case, the state court did not articulate the standard it was applying. JA 98-100. It did, however, cite its prior decisions in *Silva*, 45 Cal.3d 604, 754 P.2d 1070 and *Allen*, 42 Cal.3d 1222, 729 P.2d 115. JA 98. In both cases, the state court applied its reasonable-possibility test, applicable to state law errors occurring in the penalty

suggested remand as a remedy for the state court's consideration of invalid aggravating factors. *Sanders v. Woodford*, No. 01-99017, Brief for Appellee at 42-49. The circuit court can hardly be faulted for failing to accede to a request the State never made.

Even setting aside the waiver issue, the State's position is meritless. Circuit courts throughout the country unanimously have rejected the idea that in lieu of assessing the prejudicial impact of a sentencer's consideration of an invalid aggravating factor (and deciding whether to grant relief), federal habeas courts should remand the case to the state courts to begin the process anew. See the circuit cases cited *ante* at page 42. As these cases demonstrate, there is no reason "to carve out an exception to the rule of general applicability announced in *Brecht* for trial errors occasioned by the sentencer's consideration of a vague aggravating circumstance." *Billiot v. Puckett*, 135 F.3d at 318.

phase of a capital case, which requires relief if there is a "reasonable possibility that [the] error affected the verdict." *Allen*, 42 Cal.3d at 1281, 729 P.2d at 152; see *Silva*, 45 Cal.3d at 632, 754 P.2d at 1085. The State concedes that by citing *Silva* and *Allen* in this case, the state court was applying its reasonable-possibility test. PB 29.

The State, however, argues that the state law test is the same as the *Chapman* standard for federal constitutional error. PB 29. This is wrong. California's reasonable-possibility test requires the defendant to establish that an error was prejudicial, whereas the *Chapman* standard requires the state to establish that the error was harmless. The state court has left no doubt about this obvious difference.

In *People v. Carter*, 30 Cal.4th 1166, 1221-22, 70 P.3d 981, 1016 (Cal. 2003), the California Supreme Court applied the reasonable-possibility test and denied penalty phase relief in a capital case precisely because "defendant fail[ed], under the state standard of review, to establish a reasonable possibility that the error affected the verdict." In *People v. Jackson*, 13 Cal.4th 1164, 1233-34, 920 P.2d 1254, 1293-94 (Cal. 1996), the state court applied the reasonable-possibility test and denied penalty phase relief because it found defendant's argument as to prejudice "unpersuasive." And in *People v. Brown*, 46 Cal.3d 432, 448, 758 P.2d 1135, 1145 (Cal. 1988) – the case in which the state court formally adopted the reasonable-possibility test for penalty phase errors – the court made clear that under the state test, affirmance was presumed unless prejudice was affirmatively established. These cases establish that under the reasonable-possibility test, the burden of proving an error prejudicial is on the defendant, and that absent an affirmative showing of prejudice, relief must be denied. Of course, this is starkly different from the standard set forth in *Chapman*, where the burden of proving an error harmless beyond a reasonable doubt is on

the state, and absent that showing, relief must be granted. 386 U.S. at 24.

There is a sound reason why the state law test for prejudice does not shift the burden to the state as is done under *Chapman*. The reasonable-possibility test was not designed to assess prejudice from a constitutional error; it was designed only to "assess[] the effect of state-law error at the penalty phase of a capital trial." *Brown*, 46 Cal.3d at 448, 758 P.2d at 1145. The state court repeatedly has recognized this difference, explicitly differentiating between the *Chapman* and reasonable-possibility standards and treating them as distinct tests. See *Brown*, 46 Cal.3d at 447-48, 758 P.2d at 1145; *People v. Gordon*, 50 Cal.3d 1223, 1267, 792 P.2d 251, 278 (Cal. 1990); *Mickey*, 54 Cal.3d at 682, 818 P.2d at 121; *People v. Welch*, 20 Cal.4th 701, 762, 976 P.2d 754, 794 (Cal. 1999). This distinction would make no sense if there was no genuine difference between the two standards.

The State primarily relies on two cases to support its position that the reasonable-possibility test, like the *Chapman* standard, also places the burden of proving harmlessness on the state. PB 29, citing *People v. Jones*, 29 Cal.4th 1229, 64 P.3d 762 (Cal. 2003) and *People v. Ashmus*, 54 Cal.3d 932, 820 P.2d 214 (Cal. 1991). In each case, the state supreme court broadly described *Brown*'s reasonable-possibility standard and *Chapman*'s proof-beyond-a-reasonable-doubt standard as the same "in substance and effect." PB 29. But neither *Jones* nor *Ashmus* even purported to address the burden of proof issue articulated by *Carter*, *Jackson* and *Brown*. *Jones*, 29 Cal.4th at 1264 n.11, 64 P.2d at 784 n.11; *Ashmus*, 54 Cal.3d at 965, 820 P.2d at 231. And *Carter*, *Jackson* and *Brown* all were quite clear on this point: the reasonable-possibility test requires affirmance unless the defendant

proves prejudice. In any event, both *Jones* and *Ashmus* postdate the state court's decision in this case. To paraphrase this Court, it is a fiction for the State to contend that in 1990 its courts relied on 1991 and 2003 decisions. *Stringer*, 503 U.S. at 236.[12]

Accordingly, the Court of Appeals was correct in concluding that the state court "did not find, as it was required to do, that the error was 'harmless beyond a reasonable doubt.'" JA 17. Indeed, a contrary conclusion would have required the court to assume that the state court had decided to ignore *Brown*. As this Court recently has recognized, however, the circuit court was not free to make such an assumption. See *Cone v. Bell*, ___ U.S. ___, 125 S.Ct. 847, 853 (2005) (federal courts may not assume that state courts did not comply with their own case law).

There is further proof that the state reasonable-possibility standard is not the same as the federal constitutional harmless-beyond-a-reasonable-doubt standard: the state court failed to consider the mitigating evidence in the record in its prejudice analysis. Under *Chapman*, "the harmlessness of an error is to be judged after a review of the entire record." *Yates v. Evatt*, 500 U.S. 391, 405 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991); see also *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (court reviews all evidence in applying *Chapman* standard to penalty phase error). When there is

[12] The state also cites *People v. Coffey*, 67 Cal.2d 204, 430 P.2d 15 (Cal. 1967) to support its position. PB 29. This citation is puzzling. *Coffey* was decided in 1967, preceding the state court's adoption of the reasonable possibility test by more than 20 years. Moreover, *Coffey*, a non-capital case, had nothing to do with state law error at capital penalty phase; rather, it involved a straightforward application of the *Chapman* test to constitutional error. *Id.* at 218-19, 430 P.2d at 25. *Coffey* does not aid the State's position.

an error at the penalty phase of a capital trial, a state court must consider the mitigating evidence in order to find the error harmless. See, *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (state court's harmless error analysis was inadequate where it "failed to evaluate the totality of the available mitigation evidence"). Indeed, this Court previously held that a purported harmless error analysis of a death sentence tainted by invalid aggravating circumstances was constitutionally inadequate when the state court ignored mitigating circumstances in the record. *Parker*, 498 U.S. at 322.

Here, as the circuit court appreciated, even in the absence of a formal mitigation defense, there was significant mitigating evidence about the circumstances of the crime presented at the guilt phase. JA 21-24. This evidence raised substantial uncertainty about whether Sanders killed Allen or wanted to leave before she was killed, whether Sanders intended that Allen be killed, and whether Allen's killing was pre-planned or even intentional. The jury was entitled to weigh this uncertainty as mitigation under § 190.3, factor (k). The state court, however, said nothing about this evidence in its prejudice discussion. See JA 98-100.

Thus, even if a flawed state court harmless analysis is necessary for application of *Brecht*, relief was proper here because the California Supreme Court did not conduct constitutional harmless error review.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.[13]

Respectfully submitted,

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[13] Sanders has responded to those portions of the State's briefing that address the questions presented in the State's Petition for Writ of Certiorari and on which certiorari was granted. He recognizes that, as a fallback position, the State's amicus has asked the Court to overrule its longstanding and firmly-established distinction between weighing and nonweighing states. Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 4. This issue plainly is not within the questions presented by the current Petition for Certiorari. Nor was the issue raised in Sanders' Brief in Opposition to the State's certiorari petition. As a general matter, when the Court wants briefing on whether a precedent should be overruled, and that issue has not been presented in either the certiorari petition or brief in opposition, the Court's practice is to enter an order directing the parties to address the issue. See, *e.g.*, *Payne v. Tennessee*, 498 U.S. 1076 (1991); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 952 (1969); see generally Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 5.11 at p. 313 (8th ed. 2002).